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July 9, 1996

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Federal Communications Commission
Office of Secretary

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
Washington, D.C. 20554


Re: Amendment of Section 73.202(b) FM Table of
Allotments (Amherst and Lynchburg, Virginia)
(MM Docket No. 96-100; RM-8789)

Dear Mr. Caton:

Transmitted herewith on behalf of Greater Lynchburg Stereo Broadcasters is an original and four copies of reply comments in response to the June 24, 1996 "Comments and Objections" submitted by Southern Entertainment Corporation. These reply comments are respectfully directed to the Chief, Allocations Branch.

Should any questions arise concerning this matter, please contact this office directly.

Sincerely,


John F. Garziglia

Enclosure

Mr. J. Garziglia
10/10/96

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUL - 9 1996

Federal Communications Commission
Office of Secretary

In the Matter of)
)
Amendment of Section 73.202(b))
Table of Allotments)
FM Broadcast Stations)
(Amherst and Lynchburg, Virginia))

MM Docket No. 96-100
RM-8789

To: Chief, Allocations Branch

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REPLY COMMENTS


Greater Lynchburg Stereo Broadcasters, by its attorneys, pursuant to Notice of Proposed Rule Making, MM Docket No. 96-100, DA 96-619, released May 1, 1996, hereby submits its reply comments in response to the "Comments and Objections" submitted on June 24, 1996 by Southern Entertainment Corporation in this proceeding. Southern Entertainment Corporation claims that an application filed by WPXX(FM), Semora, North Carolina (FCC File No. BMPH-960307IC) should take priority over the proposed allotment of Channel 294A to Amherst, Virginia.

Southern Entertainment Corporation is incorrect, as its modification application for WPXX(FM) is a contingent application violating Section 73.3517 of the Commission's rules. Thus, the WPXX(FM) application is subject to return as unacceptable for filing. Attached to these reply comments is an Informal Objection filed by Piedmont Broadcasting Corp. pointing out the contingent application rule violation by WPXX(FM). Since the WPXX(FM) application is subject to return as unacceptable for filing, and no acceptable counterproposal was filed that conflicted with the proposal to allot Channel 294A to Amherst,

Virginia by the deadline for filing of comments and counterproposals in this proceeding, the Commission should move forward with the allotment of Channel 294A to Amherst, Virginia, in addition to the allotment of Channel 229A to Lynchburg, Virginia.

Respectfully submitted,

**GREATER LYNCHBURG STEREO
BROADCASTERS**

By: 
John F. Garziglia
Its Attorney

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July 9, 1996

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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JUL - 9 1996

Federal Communications Commission
Office of Secretary

In the Matter of

Southern Entertainment Corp.

Application for Construction
Permit for Minor Modification
of WPXX(FM), Semora, North
Carolina, to Upgrade from
Class A to Class C2

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FCC File No. BMPH-960307IC

TO: Chief, Mass Media Bureau

INFORMAL OBJECTION

Piedmont Broadcasting Corp., the licensee of WBTM(AM), Danville, Virginia, and WAKG(FM), Danville, Virginia, by counsel and pursuant to § 1.41 and § 73.3587 of the Commission's Rules,^{1/} hereby opposes a grant and seeks the dismissal of the above-referenced Application for Construction Permit for Minor Modification of WPXX(FM), Semora, North Carolina, filed by Southern Entertainment Corporation ("SEC") on March 6, 1996 (the "Application").^{2/} The Application fails to satisfy the Commission's minimum distance separation requirements found at § 73.207(b) and attempts to do so only by reference to the future modification of the facilities licensed to WEND(FM). The Application thus violates § 73.3517 of the Commission's Rules prohibiting contingent applications (the

^{1/} Notwithstanding § 75.3587 permitting "any person" to file an objection, Piedmont Broadcasting Corp. ("Piedmont") is a party in interest to this matter, because the signals of WBTM(AM) and WAKG(FM), Danville, Virginia, and of WPXX(FM), Semora, North Carolina, overlap, resulting in WBTM(AM) and WAKG(FM) competing for listeners with WPXX(FM). See FCC v. Sanders Bros. Radio Station, 309 U.S. 470 (1940).

^{2/} This Informal Objection is being filed pursuant to the procedures outlined in William J. Kitchen, 7 FCC Rcd 4169 (1992). Thus, this proceeding should be considered a restricted proceeding under the Commission's *ex parte* rules.

"Contingent Application Rule") and must be dismissed. In support thereof, the following is respectfully submitted:

1. SEC's Application seeks a construction permit for minor modification of the license of WPXX(FM) in order to (1) relocate the station's facility, (2) change the overall height of the antenna supporting structure and height above average terrain, and (3) increase the station's effective radiated power to change the station from a Class A to a Class C2 facility via the "one-step" provisions of Note 1 to § 73.3573 of the Commission's Rules. However, the facilities proposed for WPXX(FM) by the Application are short spaced to those of WEND(FM), which is currently licensed on Channel 293C at Salisbury, North Carolina. The Application states in the footnote to Exhibit #3 that WEND(FM) has received a construction permit to relocate its transmitter site and to downgrade to Channel 293C1 at Salisbury, North Carolina, and that the channel specified in the Application, Channel 294C2, is fully spaced to the facility specified in the WEND(FM) *construction permit*. Nevertheless, the Application specifies facilities for WPXX(FM) that are short spaced to WEND(FM) as that station presently exists. Furthermore, none of the exceptions to the required minimum distance separations specified by § 73.207 apply to the Application, and SEC does not request a waiver of that section. Instead, SEC hinges the acceptability of its Application upon WEND(FM) modifying its facilities pursuant to its construction permit and in so doing violates the Contingent Application Rule. See infra ¶¶ 4-5.

2. The Commission's Rules clearly render the Application unacceptable for filing and deserving of dismissal given the above-described state of affairs. The Note to § 73.203(b), the Commission's rule regarding availability of channels, states:

Applications requesting [changes in class] *must* meet either the minimum spacing requirements of § 73.207 at the site specified in the application, without resort to the Commission's Rules permitting short spaced stations as set forth in §§ 73.213 through 73.215 or demonstrate *by a separate exhibit* attached to the application the existence of a suitable allotment site that *fully complies* with §§ 73.207 and 73.315 without resort to §§ 73.213 through 73.215. (emphasis added).

As conceded in Exhibit #3 to the Application, the proposed facilities for WPXX(FM) are short-spaced to WEND(FM) as currently licensed. The Application does not satisfy the first part of the Note to § 73.203(b) due to this short spacing, nor does it attempt to satisfy the second criteria of the Note by demonstrating through a separate exhibit the existence of a suitable allotment site in full compliance with § 73.207 and 73.315. Rather, the acceptability of the Application hinges upon some future event, thus violating the Contingent Application Rule.

3. The Application is contingent upon the future modification of the licensed facilities of WEND(FM). Such an application violates § 73.3517 of the Commission's Rules, which states in relevant part:

"Contingent applications for . . . changes in facilities of existing stations are not acceptable for filing."^{3/}

Under the Contingent Application Rule, if an application is not grantable under the Commission's Rules when filed but rather is grantable only upon the occurrence of some future event, it is not acceptable for filing and must be dismissed. This is particularly true where the future event is not guaranteed to occur but rather is only scheduled to occur.

4. In other words, SEC's Application is not acceptable for filing because the facilities proposed therein do not meet the Commission's minimum distance separation

^{3/} The Rule then lists exceptions thereto, none of which apply to SEC's Application.

requirements, and they will meet those requirements only if several contingent events occur. For the contingencies to be satisfied, though, WEND(FM) must (1) construct its facilities pursuant to its construction permit, (2) test the modified facilities, (3) place the station on the air, (4) apply for a license, and (5) have a license granted by the Commission. Put even more simply, SEC's Application is not presently acceptable for filing and will not be acceptable for filing until the occurrence of several contingent events totally beyond the control of SEC. As such, the Application violates the Contingent Application Rule and must be dismissed.

5. Amending the Application would not remove the grounds for its dismissal. Sections 73.3517 through 73.3520 of the Commission's Rules^{4/} exist to help prevent the Commission's staff from wasting time and resources to process applications that are not presently grantable. See, e.g., Esperanza, Puerto Rico, Christiansted, Virgin Islands, DA-96-217, released March 4, 1996, at 2 (prohibition against contingent applications exists because, *inter alia*, "it has been found to be wasteful of the Commission's limited resources" to process potentially ungrantable applications). The Commission has further stated with regard to §§ 73.3518 and 73.3520 that:

an amendment cannot correct a violation which has already occurred [for the gravamen of the violation of such rules is the filing of the application itself and] *such a violation can never be cured by subsequent amendment because the act of filing cannot be undone.* Big Wyoming Broadcasting Corp., 2 FCC Rcd 3493 (1987) (emphasis in original).

^{4/} These sections contain, respectively, rules prohibiting contingent applications, inconsistent or conflicting applications, repetitious applications, and multiple applications.

Under circumstances such as those in the instant case, the only appropriate remedy is dismissal of the offending application. See Premier Broadcasting, Inc., 7 FCC Rcd 867, 870 (1992).

6. The above-stated purpose of the rules contained in §§ 73.3517 through 73.3520 takes on increased significance in the arena of FM applications filed pursuant to the Commission's "one-step" change of channel/change of power rules found at §§ 73.203(b) and 73.3573 of the Commission's Rules. The Commission has noted the high degree of licensee and applicant reliance upon the procedural rules surrounding new and modified FM facilities. See generally Conflicts Between Applications and Petitions for Rulemaking to Amend the FM Table of Allotments, 7 FCC Rcd 4917 (1992). As such, the Commission cannot allow applications which are not presently grantable under the Commission's Rules, and which may ultimately become mooted or simply ungrantable, to form the basis of that reliance.


7. If the Contingent Application Rule is not enforced to dismiss applications that are grantable only upon the happening of some contingency that may or may not occur, the Commission would undermine the reliance necessary to the orderly acceptance and processing of applications and rule making petitions regarding the FM Table of Allotments. This is clearly demonstrated by the quandary presented by the instant Application. SEC's WPXX(FM) Application is a first-come/first-serve upgrade application. Acceptance and processing of that contingent Application cuts off later-filed applications and rule making proposals which are fully acceptable under the Commission's Rules and the current state of affairs, but which possibly conflict with the WPXX(FM) Application. It is patently inequitable and completely inappropriate for first-come/first-serve cut off protection to be granted to an

application which is in violation of the Contingent Application Rule at the expense of applications and proposals that conform to all the Commission's Rules.

8. *Conclusion.* For the foregoing reasons, the Application for Construction Permit to modify the facilities of WPXX(FM) pursuant to the "one-step" provisions of the Commission's Rules should be dismissed.

Respectfully Submitted,

PIEDMONT BROADCASTING CORP.

By 

Ronald G. London
Its Attorney

Pepper & Corazzini, L.L.P.
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(202) 296-0600

April 25, 1996


RGL/sb
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CERTIFICATE OF SERVICE

I, Susan A. Burk, a secretary with the law firm of Pepper & Corazzini, L.L.P., do hereby certify that a true and correct copy of the foregoing "Informal Objection" was served by U.S. mail, first-class, postage prepaid this 25th day of April, 1996, on the following individuals:

John S. Neely, Esq.
Miller & Miller, P.C.
1990 M Street, N.W., #760
Washington, DC 20036
(Counsel for Southern Entertainment Corp.)

Mr. and Mrs. R. Plaster
P.O. Box 888
Chatham, VA 24531


Susan A. Burk

CERTIFICATE OF SERVICE

I, Tracey S. Westbrook, a secretary in the law firm of Pepper & Corazzini, L.L.P., do hereby certify that true copies of the foregoing "Reply Comments" were sent this 9th day of July, 1996, by first class, postage prepaid U.S. mail, to the following:

* Ms. Pamela Blumenthal
Allocations Branch
Mass Media Bureau
Federal Communications Commission
2000 M Street, N.W.
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John S. Neely, Esquire
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(Counsel to Southern Entertainment Corporation)


Tracey S. Westbrook

* Via hand delivery